SITTI RAJUMAH & ANOR.

v.

MOHD. RAFIUDDIN ELMIN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN IAN H.C. CHIN J
[CIVIL APPEAL NO. K 12-07 OF 1996]
13 AUGUST 1996

DAMAGES: *Quantum - Whether award made by lower Court too high - Whether it is in line with awards made in similar cases - Whether awards overlap - Whether there can be a sum for injury, scars and pain and suffering.*

DAMAGES: *Personal injuries - Principles of assessment - Approach to be taken when assessing damages - Whether itemisation process of assessing damages is wrong.*

CIVIL PROCEDURE: *Damages - Appellate Court - Whether appellate Court will reverse trial Judge's decision on amount of damages - Whether there was an erroneous estimate of damages.*

CIVIL PROCEDURE: *Costs - Whether costs constitute damages - What governs award of costs.*

CIVIL PROCEDURE: *Appeal - Adducing of fresh evidence - Appellant raises issue of limitation which was not pleaded earlier - Whether this is allowed - Whether respondent surprised - Order 18 r. 8(1)(b) of the Rules of the High Court 1980.*

The appellants (defendants) are appealing against the quantum of damages awarded to the respondent by the Sessions Court in respect of injuries sustained due to the negligence of the appellants. The respondent was travelling in the second defendant's aircraft when the first defendant, who admitted liability, negligently caused hot water to spill onto him.

Two grounds of appeal were adverted to. Firstly, it was submitted that the liability of the second defendant was limited by s. 6 of the Carriage By Air Act 1974 read together with the Carriage By Air (Application of Provisions) Order 1975. This limit to liability was not raised at the trial in the lower Court and thus the respondent submitted that, as this was not pleaded, the Court cannot decide on the issue. Against this, the appellants contended that there was in fact no need to plead the limitation.

With regards the point on limitation, the Court appreciated that if the limitation was pleaded as a defence at the trial, the respondent would have had the opportunity to plead and adduce evidence to show that there was, on the part of the first appellants recklessness and knowledge that the damage would result.

The second grounds of appeal was with regards the assessment of damages. It was claimed that the award of damages was too high.

The Sessions Court Judge had made an award for special damages even though this was neither claimed for nor was there any evidence adduced to prove the same. Counsel for the respondent, however, argued that the legal fees should be allowed as special damages. It was also claimed that the respondent would require plastic surgery and thus the Court should also consider this in their determination.

It was accepted that the respondent had suffered severe pain for about a week following the incident. His penis was swollen and the buttocks red when he was admitted to the hospital and as the wounds became infected, he had to be admitted for a second time. Further, the scars of the burns were still apparent during the Sessions Court trial. However, there was no evidence to indicate that there would be residue disability or discomfort as a result of the burns. There also was the medical report of a doctor certifying the respondent as being well on discharge.

The issue before the Court was to determine whether the award of RM110,000 was appropriate in the present circumstances.

Held:

[1] In making the award, the learned Sessions Court Judge had rejected the submissions of the Counsel for the respondents without providing any reasons for so doing. In his judgment, he had merely set out the submissions of both Counsels and then without indicating which he preferred, he made the award.

[2] As the limitation was pleaded only at this appeal stage, the Court described this as an 'ambush' tactic which should not be condoned. By not pleading the limitation, the respondent was surprised, which is contrary to O. 18 r. 8(1)(b) of the Rules of the High Court 1980. The respondent was also prejudiced by this as he had lost the opportunity to show, at the Sessions Court, that the first defendant was reckless and that she had knowledge that the damage would result. Moreover, it is trite law that a party cannot raise an issue which was not pleaded. Therefore the issue of limitation of liability cannot now be set up.

[3] Costs were not pleaded originally and thus it should not be raised. In any case, costs cannot constitute damages be it special or general as it is the rules of Court which govern the award of costs. To allow costs as damages would make nonsense of these rules of Court. This may lead to situations where a litigant is allowed costs as an item of damages even though the Court may decide not to award costs of the action to the successful litigant in that case. Further, in the event that the respondent here is awarded costs of the action by the Court, to allow

costs as an item of damages also would result in the respondent getting costs twice. It should also be remembered that unless costs are awarded on an indemnity basis, a litigant can only recover costs taxed on a party to party basis and not the entire amount that he paid to his lawyers. In the present case, the respondent had requested for costs on an indemnity basis and this was refused. He also did not appeal against this refusal. Thus, on account of all of the above, the claim for legal fees as an item of damage cannot be allowed.

[4] Counsel for the respondent had submitted in terms of general damages and there was no suggestion that there be a sum for special damages but yet an award for special damages was made. Thus there was a complete failure by the Judge to take into account the relevant considerations for assessing damages and therefore the award for special damages cannot be sustained. Consequently, this Court concludes that the award made was actually an award for general damages.

[5] An appeal Court is particularly slow to reverse a trial Judge on a question of the amount of damages. It will, however, interfere where the amount awarded was so extremely high as to make it an entirely erroneous estimate of the damage.

[6] The relevant principles to be considered when assessing damages are that awards must not overlap and that awards must not be out of line with a discernible trend or pattern of awards in reasonably comparable cases.

[7] The approach prescribed in *Seah Yit Chen (f) v. Singapore Bus Service (1978) Ltd. & 2 Ors*. which this Court adopts is that where injuries sustained were related to the same part or function of the body, there should be only one award of damages whereas if the injuries are to different parts of the body or affect different functions, a separate award for each head of damage would be appropriate.

[8] The itemisation process of assessing damages is not wrong in law in Malaysia and it may not be wrong for awards to overlap provided the damages are not "outrageously high".

[9] The question of whether the award of RM110,000 is too high depends on whether it is out of line with the trend in similar cases which means awards previously made by the Courts must be referred to. Although the Sessions Court Judge referred to cases cited by both Counsel, no reasons were given as to why one was preferred over the other. He was also reticent about why the damages awarded here were more than those in the cases cited.

[10] The Court, upon comparing the extent of injuries suffered by the respondent with the extent of injuries suffered by the plaintiff in *Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra, Devi & Anor.,* finds that the injuries suffered in the latter case are far more extensive than the injuries suffered in this case. The only factor that may alleviate the seriousness of the injuries in the present case to the referred case is that here there are injuries to the respondent's private parts. However, these injuries, unlike those suffered in the referred case, are to parts of the body which are hidden by clothes and they are not permanent. Thus it is not as serious as that suffered by the plaintiff in the referred case. This being as such, the award by the Sessions Court Judge cannot be justified when only RM80,000 was awarded in the referred case. The award here is also not in line with the awards in the other cases referred to and thus it cannot stand.

[11] Upon further comparisons with other awards given in more serious cases, the Court similarly finds the award to be outrageously high and totally unjustified.

[12] There was no evidence that the respondent would require plastic surgery and thus this is not to be taken into consideration.

[13] There cannot be a sum for the injury, a sum for the scars and a sum for the pain and suffering as this would result in producing an overlapping award that is extremely high.

[Appeal allowed with costs to appellants. Sessions Court judgment set aside. Judgment entered for the respondent against appellants for RM30,000 with costs of the lower Court]

Cases referred to:

Davies v. Powell Duffryn Associated Collieries Ltd. [1942] AC 601 ***(cit)***

Topaiwah v. Salleh [1968] 1 MLJ 284 ***(cit)***

Mahamad bin Mahamad Said & Anor. v. Perianayagam & Anor. [1972] 1 MLJ 67 FC ***(refd)***

Ngooi Ku Siong & Anor. v. Aidi Abdullah [1985] 1 MLJ 30 FC ***(cit)***

Seah Yit Chen (f) v. Singapore Bus Service (1978) Ltd. & 2 Ors. [1990] 2 CLJ 901 ***(foll)***

Jamal bin Harun v. Yang Kamsiah & Anor. [1984] 1 MLJ 217 PC ***(cit)***

Croke v. Wiseman [1982] WLR 71 ***(cit)***

Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor. [1988] 1 MLJ 19 SC ***(refd)***

Palaniyappan Chellan v. Public Utilities Board [1982] 2 MLJ xlvii ***(refd)***

K. Selveraja & Anor. v. Singapore Bus Service Ltd. [1979] 1 MLJ xxxviii ***(refd)***

Low Mei Yong v. Yeoh Geok Keow; Singapore Suit No. 1585/1980 ***(refd)***

Hamizan bin Abd. Hamid v. Wong Kok Keong [1994] 3 MLJ 630 ***(refd)***

Inderjeet Singh a/l Piara Singh v. Mazlan bin Jasman & 2 Ors. [1995] 3 AMR 2201 ***(refd)***

Mohd. Yusof bin Abdul Ghani v. Tee Song Kee & Anor. [1995] 3 CLJ 738 ***(refd)***

Legislation referred to:
Carriage By Air Act 1974, s. 6
Carriage By Air (Application of Provision) Order 1975, Art. 22, 25
Rules of the High Court 1980, O. 18 r. 8(1)(b)

Other sources referred to:
Access to Justice, Woolfe LJ
Damages, McGregor, 15 Edn., para 662

For the appellants - Connie Willie; M/s. Skinner, Lind, Willie, Wong & Chin
For the respondent - Sugumar Balakrishnan; M/s. Sugumar & Co.

JUDGMENT

Ian H.C. Chin J:

Introduction

This is an appeal against the decision of the learned Sessions Court Judge who had on 1 April 1996, (after a trial concerning only the quantum of damages because liability was admitted) awarded the respondent damages in the following terms:

> RM30,000 for injuries, RM20,000 for scars and RM600 for legal fees totalling the sum of RM50,600 as special damages together with interest thereon at the rate of 4% per annum from 17 June 1994 until the date of judgment and, RM60,000 for pain and suffering as general damages together with interest thereon at the rate of 8% per annum from the date of judgment until full payment and costs to be taxed.

That award was made after the following submission of Mr. Sugumar Balakrishnan, learned Counsel for the respondent, *viz.*:

> Measure of damages
>
> 11. The plaintiff is entitled to claim damages for the injuries sustained, including the scars which have remained since recovery, and for pain and suffering. In considering these heads of claim, this Court ought to take into account the following pertinent and uncontroverted facts:
>
> (a) The plaintiff was only 8 years of age at the time of the injury;
>
> (b) The plaintiff was admitted as an out-patient on 17 June 1994. On 18 June 1994 he was admitted as an in-patient until 21 June 1994 and re-admitted on 23 June 1994 until 2 July 1994 during which time he had been treated for his injuries and undergone desloughing;
>
> (c) Both medical witnesses have testified that it would take at least 2 weeks from his discharge on 2 July 1994 to fully recover;
>
> (d) Both medical witnesses have testified to the pain suffered by the plaintiff,

(e) The scars that have remained since recovery and which the plaintiff shall have to live with. Here, the evidence shows that the scars caused considerable discomfort, itchiness, bleeding and difficulty in walking;

(f) The medical evidence and the medical reports confirmed the injuries particularised at paragraph 12 of the Statement of Claim;

(g) The medical evidence also shows the burns sustained by the plaintiff in the genital area which is a highly sensitive area. These burns were described as more than superficial and were deemed to be sufficiently serious as to require his admission as an in-patient for a length of time.

12. In R.K. Nathan's *Quantum of Damages* at pp. 231-232 the learned author has referred to 3 cases concerning damages awarded for burns of which the case of *K. Selvaraja & Anor. v. Singapore Bus Service Ltd.* [1979] 1 MLJ xxxviii may be of some assistance. In that case, the plaintiff was 12 years of age who suffered 1% burns in his hand and was awarded S$5,000 as general damages. However, in our case the plaintiff was 8 years of age and suffered 5% burns in his genital area. Further, the damages awarded in the Singapore case was decided in 1978 and inflation ought to be taken into account.

13. It is submitted that a sum of RM40,000 would be appropriate for the injuries suffered by the plaintiff.

14. The plaintiff also has permanent scars in his genital area. Please see R.K. Nathan's *Quantum of Damages* at pp. 235-237. It is submitted that a sum of RM25,000 would be appropriate in this regard especially taking into account possible plastic surgery in future.

15. In respect of pain and suffering it is instructive to look at the Federal Court decision in *Yeo Kim Kuan v. Hamid* [1968] 2 MLJ 188 where the Court cited with approval the description of pain and suffering in *West v. Shephard* [1964] AC 326.

16. It is submitted that pain and suffering comprises both physical and mental. Therefore, it also includes nervous shock fright at accident and fear of future incapacity under the mental element.

17. On the facts and evidence adduced at the trial it is submitted that a sum of RM75,000 would be a fair and appropriate award for pain and suffering.

18. Apart from the sum of RM40,000 claimed for injuries, RM25,000 claimed for the scars and RM75,000 claimed for pain and suffering, the plaintiff also claims interest on the sum of RM140,000 at the rate of 8% per annum from 17 June 1994 until the date of judgment and statutory interest thereon at the rate of 8% per annum from the date judgment until full payment. The plaintiff also claims reimbursement of all legal fees and expenses on a full solicitor-client indemnity basis together with costs.

It appears that in making the award the learned Sessions Court Judge rejected the submission of Ms. Connie Willie, learned Counsel for the appellants, without giving any reason for so doing and this can be gathered from his judgment where he repeated the rival submissions of both Counsel and then, without ruling on which he preferred, merely went on to make the award in the concluding passage in the following terms:

> Now coming back to this assessment of damages, from the evidence as shown by the five witnesses for the plaintiff, it is clear that the plaintiff suffered burns by hot water and subsequent admission is the direct result of the said negligence. Therefore the Learned Counsel submitted that a sum of RM40,000 is appropriate, however taking into account the cases cited, this Court of the humble opinion that a sum of RM30,000 is most reasonable.
>
> As to the scar, it is submitted the sum of RM25,000, however in this Court's humble opinion, a sum of RM20,000 is appropriate. In addition to the receipt for RM600, the total of special damages is RM50,600.
>
> Now, coming to the award of general damages for pain and suffering. Learned Counsel for the plaintiff submitted a sum of RM75,000. However taking into account the cases cited by defence Counsel, this Court is of the opinion that the sum of RM60,000 is most reasonable.
>
> In the result, special damages of RM50,600 together with interest of 4% per annum as from 17 June 1994 until the date of judgment. General damages at RM60,000 together with 8% interest from the date of judgment to the date of payment in accordance with s. 11 of the Civil Law Act 1956 and that the costs to be taxed by the Registrar of the Session's Court, Kota Kinabalu.

As for the injuries suffered by the respondent, a summary of which I have already adverted to when I reproduced the submission of Mr. Sugumar, a more detailed description will be given later. The other facts of this case can be briefly summarised this way. The respondent was on 17 June 1994, travelling in the aircraft of Malaysian Airline System Bhd. ("the 2nd appellant") when the stewardess, Sitti Rajumah ("the 1st appellant") negligently caused hot water to spill or pour onto the respondent who was then 8 years old. He was admitted, discharged, re-admitted and then discharged from the hospital. It was against this backdrop that the appeal was argued.

Grounds of Appeal

(1) Limitation of Liability under Article 22 of the Carriage By Air (Application of Provisions) Order 1975 & Contributory Negligence

Ms. Willie had submitted, for the first time, that the liability of the 2nd defendant was limited by s. 6 of the Carriage By Air Act 1974, read with the Carriage By Air (Application of Provisions) Order 1975 to RM48,000. This limit to liability was not pleaded and Mr. Sugumar submitted that the Court cannot decide on the issue while Ms. Willie had submitted that there was no

need to plead the limitation. In so far as the limitation of liability is concerned, it has to be observed that if the limitation is set up in the defence it can be met with an answer that the omission was due to recklessness and with knowledge that damage would probably result (see Article 25 of the Carriage By Air (Application of Provisions) Order 1975) which makes the limitation inoperable. Therefore, if it was pleaded, the respondent would have an opportunity to plead and to adduce evidence as regards the issue of recklessness and knowledge that the damage would result. Instead, Ms. Willie resorted to the tactic of ambush by only at the hearing of the appeal, submitting that the limitation applies. I am of the view that our Court should not condone such tactics which I would term, "ambush", borrowing from the words used by Lord Justice Woolfe of England in his paper *Access to Justice* where he had lamented the practice of "trial by ambush" and he had put forth proposals by way of amendment to the rules of the Courts in England to prevent such tactics which proposals, I am given to understand by the press, are soon to be laid before the British Parliament. On my part I can prevent such tactics from creeping into our system by decrying them. Aside from that, by not pleading that limitation, the respondent was not only surprised, which O. 18 r. 8(1)(b) of the Rules of the High Court 1980 forbids, but was also prejudiced as he had lost the opportunity to show that there was recklessness and knowledge that damage would result on the part of the 1st appellant. Furthermore, it is trite law that a party cannot raise any issue which is not pleaded. Therefore, the said limitation as to the amount of liability cannot be set up. For the same reason, the question of contributory negligence (assuming there is evidence to support but which I cannot find any) argued by Ms. Willie cannot be considered.

(2) Assessment of Damages

The other grounds of appeal can be considered together as they all relate to the assessment of damages. The learned Sessions Court Judge had awarded the sum of RM50,600 for "special damages" though it was never the submission of Mr. Sugumar at the lower Court that that sum was for "special damages". What was pleaded as particulars of special damages are as follows:

(a) Medical expenses including costs of present and future nursing care,

(b) Transportation expenses;

(c) Miscellaneous expenses incurred by the plaintiff's father and next friend for the sole benefit of the plaintiff as to which the plaintiff is liable for reimbursement of such expenses to his father and next friend.

[The plaintiff shall adduce full particulars and computation of such claims, when ascertained, at the trial of this action.]

No evidence was led to prove any of the items of special damages, *supra*, and Mr. Sugumar did not even touch on that aspect of the claim in his closing speech in the Court below though evidence was produced showing the paying of RM6,000 as legal fees to the law firm of Mr. Sugumar. Therefore, no amount should be awarded for special damages. But Mr. Sugumar had argued before me that the legal fees of RM6,000 should be allowed as special damages. Apart from it not being pleaded which prevents it from being raised, it also cannot constitute damages be it special or general as to be recoverable as such item is governed by the rules of the Court governing the award of costs and to award legal fees as damages would make nonsense of the said rules since to allow the item as damage may result in a litigant getting costs through another view though the Court may not exercise its discretion to award costs to a successful litigant (*McGregor* on *Damages*, 15 edn., para. 662). It must also be borne in mind that a litigant, unless cost was awarded to him on an indemnity basis, cannot recoup in full what he has to pay his own lawyers but only the costs taxed on a party to party basis. For the respondent to claim from the appellants whatever legal fees he had paid to his lawyer would mean claiming for costs on an indemnity basis which matter should properly come under the claim for costs of the action which the respondent had asked for. In fact he had asked for costs on an indemnity basis which the learned Sessions Court Judge appeared not to have granted since no such order was made and there is no appeal against that order. Furthermore, to allow the item would mean the respondent would be getting almost twice over the costs in the event the Court awards him costs of the action. For the reasons, this claim cannot be allowed. Therefore, the so-called "special damages of RM50,600" cannot be sustained. As can be seen from learned Counsel's submission, *supra*, Mr. Sugumar did not in any way suggest that there should be that sum for special damages. This means the learned Sessions Court Judge had failed totally to take into account the relevant considerations for assessing damages. What Mr. Sugumar had urged the learned Sessions Court Judge to award is this:

For injuries	RM40,000
For permanent scars and plastic surgery	RM25,000
For pain and suffering	RM75,000
	RM140,000

Mr. Sugumar was submitting in terms of general damages but the learned Sessions Court Judge had somehow let the words "special damages" crept into his judgment when he was actually considering general damages. Therefore it remains to be considered whether the award of RM110,000 made by the learned Sessions Court Judge, which I can conclude to be actually an award for general damages, can be assailed or not. The law relating to the

circumstances under which an appellate Court can interfere with the decisions of a lower Court relating to the assessment of damages are too well-known and a detail discourse of it is not necessary. Suffice to say for our purpose and very briefly that an appeal Court is particularly slow to reverse a trial Judge on a question of the amount of damages (*Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] AC 601) but will interfere where the lower Court acted upon some wrong principle of law or where the amount awarded was so extremely high as to make it an entirely erroneous estimate of the damage (*Topaiwah v. Salleh* [1968] 1 MLJ 284). Other relevant principles to bear in mind when assessing damages are that awards must not overlap and awards must not be out of line of a discernible trend or pattern and in this regard *Mahamad bin Mahamad Said & Anor. v. Perianayagam & Anor.* [1972] 1 MLJ 67 FC, at p. 68 (followed in *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ 30 FC) had said:

> It seems to us that the two cases relied on by the learned Judge are authority for the proposition that an award should not be out of line with a discernible trend or pattern of awards in reasonably comparable cases ...
>
> With respect we do not think that the learned Judge should have taken compensation for each of the two injuries suffered by the plaintiff separately and then just added them up at the end. The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. See *Fletcher v. Autocar and Transporters Ltd.* There is an element of overlapping when two or more injuries are suffered simultaneously.

However, the principle against overlapping was also commented on in *Seah Yit Chen (f) v. Singapore Bus Service (1978) Ltd. & 2 Ors.* [1990] 2 CLJ 901, 903 per Yong Pung How J, and in these terms:

> In my opinion, which approach is to be followed in each case must necessarily depend on the facts of the case, bearing in mind the need to avoid overlapping. When the injuries sustained are related to the same part or function of the body, there should only be one award of damages, without any risk of overlapping; where the injuries sustained are to different parts of the body and affect different functions, as in the instant case where the plaintiff has sustained injuries to the knee and to the spine, it would be appropriate to make a separate award for each head of damage. In such cases, however, care would still have to be taken to avoid a further "sub-itemising" of a head of damage or injury.

which passage, I am of the view, reflects the best pragmatic approach to the issue and I would respectfully adopt it. It should also be noted that the itemisation process of assessing damages is not wrong in law in so far as Malaysia is concerned (*Jamal bin Harun v. Yang Kamsiah & Anor.* [1984] 1 MLJ 217 PC) and it is not wrong even if there is overlapping provided that the damages do not look "outrageously high" (*Croke v. Wiseman* [1982] WLR 71). Those are the principles that should detain our attention because they relate directly to the grounds of appeal and thus, it seems to me that the solution to the issues raised in this appeal lies in the answer to the question of whether

the award of RM110,000 is extremely or outrageously high. That answer depends on whether it was out of trend or with a line of similar cases. Therefore, one must look at awards that have been previously made by the Courts to see the trend.

The learned Sessions Court Judge, though he referred to the various cases cited by both learned Counsel, did not give his reasons why he preferred one to the other and why he had topped up the figures over and above any of the awards in those cases. For ease of reference, I will set out the facts and the awards of the cases in the following table, TABLE 1, which were cited by both learned Counsel, *viz.*:

TABLE 1

No	Name of Case	Description	Quantum
1.	*K. Selveraja & Anor. v. Singapore Bus Service Ltd.* [1979] 1 MLJ xxxviii	Age 12, 1/4 full thickness friction burn over (R) palm and extensor aspect of (R) thumb, index and middle finger and 1% partial thickness friction burn over lateral aspect of (R) upper forearm. Treatment included grafting.	S5,000 as general damages
2.	*Palaniyappan Chellan v. Public Utilities Board* [1982] 2 MLJ xlvii	Age 56, 45% thickness burns over face, trunk and both upper limbs and also enoriation of (R) internal auditory canal resulting in extensive keloids over the chest, shoulders and left wrist, in limitation of 10% abduction of both shoulders and in not being able to do his normal duty and activities.	S24,000 for pain and suggering and S4,000 for loss of future earnings.
3.	*Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Dewi & Anor.* [1988] 1 MLJ 19 SC	Woman sustained 65% 1st and 2nd degree burns on the face, trunk, both thighs and both upper limbs. Underwent surgery on two occasions for skin graft. Keloids developed over burnt areas and required indefinite psychiatric therapy throughout her life. Keloids, a constant source of pain and mental and physical distress.	RM80,000 as general damages

4.	*Low Mei Yong v. Yeoh Geok Keow* Singapore Suit No. 1585 of 1980 (Dass, Quantum on Accident Claims, vol. 3.	4-year-old, 4% friction burns on upper right thigh, operated for skin grafting. Area well-healed except for some hypertrophic scarring	S9,500 as general damages.

The first thing to notice is that in all the four cases there is no separate item of award for pain and suffering and for injury. There must have been pain accompanying the burns suffered in those cases and the awards must therefore have taken that into account. It will also be notice that case (3) consisted of burns suffered by a woman over most part of her body and more particularly on her face with the result that she required life-long psychiatric therapy and the award was RM80,000. How then does the burns suffered by the respondent compare with those cases that I have just referred to? The injuries of the respondent are generally not in dispute and I had earlier reproduced the speech of Mr. Sugumar which summarised the injuries. Apart from that, Dr. Ting Aung testified that the respondent had undergone excruciating pain and would suffer pain for about a week after the incident. It is also in evidence that the penis was swollen and the buttock red when the respondent was admitted to the hospital on 18 June 1994, and the learned Session Court Judge had also examined the respondent during the trial and found him to still bear the scars of the burn. Another doctor who testified was Dr. Loh Choong Sing who attended to the respondent during the period he was in hospital from 18 June to 21 June 1994 and from 23 June to 2 July 1994. He said the respondent was admitted the second time because his wound became infected and that the respondent suffered 5% burns. There is no evidence from any doctor that the respondent would suffer any residue disability or discomfort arising from the burns he had suffered and I will have to take it that there is none as otherwise there would have been evidence forthcoming at the trial, like an up to date medical report on the respondent to establish whatever continuing disability or discomfort he may still be suffering if that really was the case. This means the respondent, except for the scars, is alright at the date of the trial and was so since the date of discharge from the hospital on 2 July 1994 (there is some conflict in the evidence as to whether it was 1 July or 2 July 1994 that the respondent was discharged). Dr. Loh Choong Sing stated in his medical report dated 2 July 1994, that the respondent "was well on discharge" but he had also stated that there should be follow up in the clinic but there was no evidence as to whether the respondent sought further treatment whether at the clinic or elsewhere. Dr. Ting Aung gave a more detail description of the injuries suffered by the respondent and this is contained in his letter dated 22 February 1995, *viz.*:

Medical Report for Mohd. Rafiuddin bin Elmir

Mohd. Rafiuddin bin Elmir, 8 years, son of Encik Elmir bin Haji Mohd Kasim, was admitted on 18 June 1994 to Hospital Tawau for scald burn injuries over genitalia, scrotum, perineal region and buttock sustained on 17 June 1994 on the flight from Kota Kinabalu to Tawau. The nature of burns was superficial and about 5% in extent. He was seen in Casualty department on 17 June 1994.

The investigation done were Urine FEME, FBC and BUNSE and RBS. Urine FEME, BUNSE and RBS were within normal range. TWBC was $160/10^9$ /L and was above normal level. This could be attributed to burn injuries. The child was treated with syrup erythromycin 250 mg 6 hourly, syrup phenergan 7.5 ml tds, tab panadol 1 tds and daily dressing with S.S.D. cream.

He was discharged on 21 June 1994 and advised to continue dressing in Kunak Clinic. He was referred to Hospital Tawau again on 23 June 1994 from Hospital Semporna and was admitted on the same day ...

FBC, BUNSE were within normal limit. Wound swab for C + S grew Enterobadir Cloacae on 23 June 1994 and E coli on 27 June 1994 and patient was treated with appioptiate antibiotics. Desloughing of burn would was done on 27 June 1994 under ketamine anesthesia. The wound became clean, improved and was discharged on 1 July 1994. After this, patient did not come for follow up to this hospital.

As against this, the following is the medical evidence regarding the injuries in case *Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor.* [1988] 1 MLJ 19 SC:-

As a result of burns she has extensive keloid scar involving almost the whole of the front of the body, left upper limb, both thighs in front, and areas behind the knees and legs. She also has pigment problem involving almost the whole body.

In my opinion she will be needing continuous medical and surgical care almost throughout her life. It can be categorically stated that she will never be the same person both physically and mentally as before the accident.

Surgery will have to be done in stages to gain functional improvement and also some cosmetic improvement. It is impossible to predict as to how many surgical procedures she would need.

By now it should be obvious that the injuries suffered by the respondent are, in terms of seriousness and extent, in no way near that of the plaintiff in case *Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor.* [1988] 1 MLJ 19 SC. The only factor that may warrant alleviation of the seriousness of the present case to case *Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor.* [1988] 1 MLJ 19 SC is the fact that the respondent suffered injuries to his private part but then again, they are not permanent. As for the scars of the respondent, they are at a place where the attire would hide it which the plaintiff in case *Pengarah*

Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor. [1988] 1 MLJ 19 SC was not so fortunate because it, apart from other discernible places, was in her face. The respondent does not suffer from ugly keloids as the plaintiff did in case *Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor.* [1988] 1 MLJ 19 SC. The respondent also does not suffer any residue ill effects, any way none that measures up to that suffered by the plaintiff who required attention for the rest of her life. Given all these factors, how could an award of RM110,000 be justified when RM80,000 only was awarded in case *Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor.* [1988] 1 MLJ 19 SC, a far more serious case. In the result, the award of RM110,000 is so out of trend and more so if viewed in the light of the other cases mentioned in the table, that the award cannot stand. Another simple illustration to show that the award to the respondent is outrageously high is to compare it with the awards given to other more serious injury cases. For this purpose, I will set out those cases again in table form, TABLE 2, *viz.*:

TABLE 2

No	Name of Case	Description	Quatum of General Damages
1.	*Hamizan bin Abd. Hamid v. Wong Kok Keong* [1994] 3 MLJ 630	1. Cerebral concussion, bleeding from left side of cerebrum of the brain and permanent residue effects in the form of weakness and spasticity of the lower limbs; 2. Degloving injury of chest with permanent scar, laceration of lungs and abdominal injury. 3. Fracture of skull. Brachial plexus injury of upper limb with complete loss of power from left shoulder downwards with no sensation in left upper limb and amputation was recommended.	RM18,000 RM12,000 RM50,000
2.	*Inderjeet Singh a/l Piara Singh v. Mazlan bin Jasman & 2 Ors.* [1995] 3 AMR 2201	1. Fracture of femur 2. Fracture of tibia and fibula 3. Fracture of pelvis 4. Abrasions and lacerations 5. Brain injury and partial quadriplegia	RM12,000 RM12,000 RM16,000 RM 4,000 RM200,000

3.	*Mohd. Yusof bin Abdul Ghani v. Tee Song Kee & Anor.* [1995] 3 CLJ 738	Laceration of chin, abrasions and dislocation of 5th cervical vertebra which has healed in a displaced position. Displacement of fragment onto the cervical portion of the spinal cord causing wide spread neurological changes and disability. Weakness in both hands and both lower limbs, deceased sensation below upper chest level and inability to control bladder or bowel function. Wheel chair dependent, cannot engage in any occupation and require assistance in bathing, cooking, toilet, etc.	RM90,000 for fracture dislocation of the 5th cervical vertebra, RM1,500 for lacerations and abrasions and RM38,400 for nursing care.

It can be seen from TABLE 2 that a fracture limb in no case commands more than RM16,000. Even in the case where the person was rendered wheel chair-bound, case *Mohd Yusof bin Abdul Ghani v. Tee Song Kee & Anor.* [1995] 3 CLJ 738, TABLE 2, the award for pain and suffering is only RM90,000 with further a award for future nursing care. That should give some indication as to the range of the awards which, among other things, take into account the severity of the injury. I just cannot see how burns to the area of the genital and to the genitals caused by scalding by hot water with no residue damage save for scars that the respondent had suffered could be considered as more serious than that of case *Mohd Yusof bin Abdul Ghani v. Tee Song Kee & Anor.* [1995] 3 CLJ 738, TABLE 2, where the injury had rendered a person wheel chair-bound. Since only RM90,000 was awarded in respect of the injuries in case *Mohd Yusof bin Abdul Ghani v. Tee Song Kee & Anor.* [1995] 3 CLJ 738, TABLE 2, for the pain and suffering, I just cannot see how it can be justified for Mr. Sugumar to urge the learned Sessions Court Judge to award RM140,000 for the respondent and which resulted in an award of RM110,000 which therefore is not only outrageously high but totally unjustified.

As for plastic surgery which the respondent allegedly required and which Mr. Sugumar submitted at the lower Court, there is not a shred of evidence from the two doctors who testified at the trial that such is required.

What then should be the award for this case? In this regard Ms. Willie had very appropriately drawn the attention of the lower Court to the case of *Palaniyappan Chellan v. Public Utilities Board* [1982] 2 MLJ xlvii (see case *Palaniyappan Chellan v. Public Utilities Board* [1982] 2 MLJ xlvii, TABLE 1) but though mention was made of the case, the learned Sessions Court Judge did not explain why that case cannot be taken as a good guide for our case.

In my view, the injury in our case is in no way near the seriousness of that of *Palaniyappan Chellan v. Public Utilities Board* [1982] 2 MLJ xlvii and therefore an award in our case should not exceed that. In that case, Singapore $24,000 was awarded. Mr. Sugumar appears to have agreed that *K. Selveraja & Anor. v. Singapore Bus Service Ltd.* [1979] 1 MLJ xxxviii (case *K Selveraja & Anor. v. Singapore Bus Service Ltd.* [1979] 1 MLJ xxxviii of TABLE 1) as being a more appropriate since he took the figure, S$5,000, awarded there as the basis though he had argued that the sum for our case should be increased to RM40,000 because it was only 1% burn in that case compared to 5% in our case and because of inflation since 1978. The burn is at one locality and also whatever scar, as I have said earlier, could not be seen. In fact, there is no evidence from the two doctors who testified that there will be permanent scars and not surprisingly because of the tender age of the respondent and the ability of the body to replace the skin and that probably explains why no skin grafting was necessary. I agree that there was excruciating pain. But there cannot be a sum for the injury, a sum for the scars and sum for the pain and suffering as this would result, as happened in this case in producing and extremely or outrageously high and overlapping award.

Taking all the circumstances I have mentioned and since Ms. Willie did not complain about the award of RM30,000 made by the learned Sessions Court Judge, a global award of RM30,000 would be an adequate compensation.

Conclusion

I therefore allow the appeal with costs to the appellants. The judgment of the learned Sessions Court Judge is set aside and instead judgment will be entered for the respondent (plaintiff) against the appellants (defendants) for the sum of RM30,000 with cost of the lower Court.

Reported by S Puvan